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A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem

By ROBERT L. MONTAGUE, III*

PREFACE

This paper is an evaluation of certain aspects of the current problem which the United States faces in connection with its Naval Base at Guantanamo Bay which it originally leased from Cuba in 1903.

The first part is an effort to interweave legal, historical and diplomatic background facts and policies and to position the Guantanamo problem in the larger perspective of Cuban and Latin American affairs of which it is the integral part.

Out of this factual and policy complex, two primary problems emerge. Part II analyzes some of the arguments which Cuba might develop should she seek to bring the Guantanamo Bay lease before the International Court of Justice. Those discussed are fundamental breach and *rebus sic stantibus*. Both of these offer potential release from her treaty obligations if she can qualify under them. A counter argument for the United States, based on the doctrine of *pacta sunt servanda*, is also developed.

Part III analyzes the legal nature of American rights in leased bases such as Guantanamo. On the basis of these rights, the applicability of the right of self-defense under Article 51 of the United Nations Charter is explored and a conclusion that it would apply is offered.

Part IV brings into focus the legal policy conflicts involved in this problem area and offers some concluding comments on them.

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The Appendix contains pertinent legal documents relating to the problem.

I. DIPLOMATIC AND HISTORICAL BACKGROUND

The train of events which has led to the current and continuing crisis over Guantanamo Bay began its journey with Cuban rumblings for independence which first became actively expressed in open hostilities in 1895. These events culminated in the Spanish American War of 1898, ostensibly fought for the purpose of securing Cuban independence from Spain. By the Treaty of Paris of December 10, 1898¹ Spain renounced all of her claims to Cuba as well as a number of other island territories.

The United States occupied Cuba, following the cessation of hostilities, under Governor-General Leonard Wood until the inauguration of the Cuban Republic on May 20, 1902. As between the United States, Spain and other foreign countries, Cuba was treated as if it were conquered territory. In so far as the United States and Cuba were concerned, the island was regarded as "territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."²

Diplomatic Relations Established

The Treaty of Relations with Cuba of May 22, 1903,³ established the initial diplomatic connection between the United States and the new republic. This treaty incorporated the provisions of the Platt Amendment to an Act of Congress of March 2, 1901 making appropriations for the Army.⁴ The well known provisions of this amendment had already been included in the Constitution of Cuba of February 21, 1901 and its appendix of June 12, 1901.

Article VII of the Platt Amendment provides:

That to enable the United States to maintain the independence of Cuba and to protect the People thereof, as well as for its own defense, the government of Cuba will

¹ 30 Stat. 1754 (1898).

² 1 Moore, A Digest of International Law 536 (1906).

³ 1 Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Others Power 362 (1910).

⁴ 31 Stat. 897 (1901).

sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States.⁵

The Amendment also contains the more galling provisions as to United States' rights to intervene in Cuba which were eventually to be changed in 1934.

Naval Base Leased

During the period when the Treaty of Relations was being prepared, an agreement designed to fulfill the purpose of article VII of the Platt Amendment was also being drawn up. On February 13, 1903, President Theodore Roosevelt signed an agreement for the lease to the United States of lands in Cuba for coaling and naval stations.⁶ This agreement was supplemented by a lease to the United States by Cuba of land and water for naval or coaling stations in Guantanamo and Bahia Honda, ratifications for which were exchanged on October 6, 1903.⁷

American rights in Guantanamo Bay thus stem from an executive agreement and a lease. The most significant portion of these documents, for the purpose of this discussion, is to be found in Article III of the aforementioned executive agreement. It states:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the term of the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

A question exists as to the precise nature of the "possession" which the United States thereby acquired which will be discussed *infra*.

⁵ Malloy, *op. cit. supra* note 3, at 362.

⁶ *Id.* at 358.

⁷ *Id.* at 360.

intervention in a statement of December 28, 1933, and left the maintenance of constitutional governments in the hands of the people of each country and in the hands of other nations jointly when it should become their concern as a result of failure of orderly processes.¹⁷

The Treaty of 1934

The climax of this process was the new Treaty of Relations Between the United States of America and Cuba of May 29, 1934,¹⁸ signed by Secretary of State Cordell Hull, Assistant Secretary of State Sumner Welles, and Provisional President of Cuba, Senor Dr. Manuel Marquez Sterling. This treaty terminated the treaty of 1903, preserving certain of its provisions. In Article III, the two agreements of 1903, in regard to the Naval Station at Guantanamo, were continued in force on the same conditions.

The effect of this treaty was to give Cubans the full responsibilities of government after thirty years of American tutelage. But as Mr. Woolsey points out,¹⁹ this did not eradicate or lessen the great interest of the United States in the Caribbean area which centered around the Panama Canal. American political and commercial policies continued to revolve around this center, though they may not have been proclaimed informal treaties or agreements. American policies were simply the necessary and obvious sequences of an actuality.

In concluding his remarks about this treaty, Mr. Woolsey comments that:

It is clear that the United States, acting under the Monroe Doctrine and the rights of International law, will brook no situation in the Caribbean which menaces her national defense. It is an inevitable corollary that this region will always be a sphere of influence of the United States.²⁰

Pan Americanism Evolves

Developments in more recent years have perhaps tempered the degree of influence which the United States has exercised in this sphere, but the sphere does continue to exist. Pan-Americanism has, however, evolved as the guiding principle of international

¹⁷ Woolsey, *supra* note 10, at 530-34.

¹⁸ 48 Stat. 1682 (1934).

¹⁹ Woolsey, *supra* note 10, at 534.

²⁰ *Ibid.*

law and politics in our more recent Latin American relationships. It finds expression in the declaration at Buenos Aires of December 21, 1936, of the Principles of Inter-American Solidarity and Cooperation. This declaration provides particularly for methods of peaceful settlement of disputes between American nations. The United States and Cuba, as well as other Latin American countries, have subscribed to this declaration.²¹

The inter-American solidarity that was engendered by this declaration and others subsequent to it, and by the impact of World War II, has led all American republics to become charter members of the United Nations on June 26, 1945, to the Inter-American Treaty of Reciprocal Assistance of September 2, 1947, and to the Charter of the Organization of American States which came out of the Bogota conference of 1948. This Charter elevated the concept of Pan-Americanism from the level of executive agreements and declarations to a treaty basis.²² Cuba and the United States, as well as nineteen other Latin American countries, became parties to the Charter. The principles which it establishes, coupled with procedures provided for in the United Nations Charter provide the essential framework for the peaceful settlement of any disputes which may arise between signatory nations.

Batista Dictates

The train of events which we have mentioned at the outset really began to roll with precipitous speed toward the current Cuban crisis when, in 1952, Fulgencio Batista took over as a military dictator after it had become apparent that the vote was running against him. Although economic conditions improved under his government, wealth continued to be concentrated in the hands of a very small upper class. Graft was quite customary. There was no peaceful way for Batista to be moved out, and the situation was ripe for some type of social justice and land reform movement to develop.

The Appearance of Castro

With this backdrop, Fidel Castro first appeared on the scene as the leader of an abortive revolutionary attempt on July 26,

²¹ Bemis, *op. cit. supra* note 14, at 298.

²² Berle, *supra* note 16, at 41-55.

1953. He was captured, imprisoned, and later released only to begin again by organizing a small force in Mexico. He succeeded in taking twelve of his men into the Sierra Maestra mountains and began a long seige of guerrilla warfare. At the start there was no anti-Americanism apparent in this development.

By 1958 anti-Batista feeling in Cuba had grown strong and sympathy for the Castro movement was developing in the United States and other Latin American countries, some of whom sent aid to Castro. The United States, however, remained officially bound to supply arms to Batista under military aid agreements. The Cuban Communist group shifted sides from Batista to Castro in mid-1958 and Batista began to lose his hold over the army.

On January 1, 1959, Batista fled, and Castro and other insurrectionist groups converged on Havana. Judge Manuel Urrutia Lleo was made provisional President on January 2, and Castro was named head of the armed forces. Initial political policy appeared to be aimed at stabilizing the economy and development of democratic ideals. The new government received the endorsement and congratulations of other Latin American democracies.

Anti-Americanism Becomes Apparent

However, it did not take more than a month before a bitter anti-American note began to sound from the Castro group. In March of 1959, President Jose Figueres of Costa Rica was publicly attacked for supporting the United States. It has been suggested that this marked a turning point in Cuban policy.²³

Certainly by April, 1959, it was apparent to a number of Cuban leaders that Castro's policy was to set up a genuine Communist government. Although Castro apparently had American sympathy when he visited the United States in the spring of 1959, there was little similarity between his pleasantries in Washington and what his supporters were doing and saying at home in Cuba.

Castro himself may not always have been a Communist, and there were non-Communists in his government. The Castro regime's original orientation may have been debatable. However, it is undeniably true that the end product has become Communist in character in terms of foreign relations and structure. With Mikoyan's visit in 1960, Khrushchev's announcement that

²³ *Ibid.*

Foreign Policy Developments

Cuban-United States relations developed under the agreements just described until 1934. The basic philosophy or policy behind the Platt Amendment provisions appears to have been to help achieve Cuban internal order and stability. Contemporaneously, the United States was also engaged in the process of acquiring and building the Panama Canal. This factor, coupled with a benevolently paternalistic, if not imperialistic, attitude on the part of the United States towards not only Cuba but all Latin America, determined our policy in the Caribbean area.

Secretary of State Elihu Root was perhaps one of the more instrumental figures in the earlier phases of Cuban independence. Both as Secretary of War and as Secretary of State, he was concerned as "a lawyer to direct the government of these Spanish islands."⁸ Cuba was regarded as the most important of these "Spanish islands." Its affairs were considered as an international problem of a twofold nature.⁹

The first step was to arrange matters as rapidly as practicable so that Cuba might be turned over to its own people in accordance with the promise of the United States Congress on declaring war against Spain. We have noted the treaties indicating this accomplishment. The United States also undertook to guarantee Cuba against disorder within and attack from without its territory. A republican form of government was to be established in the island adequate for the protection of life, property and individual liberty, and for the performance of its international obligations. The United States, under the Platt Amendment, reserved the right to intervene to assure the accomplishment of these purposes.

Initially this was the only motivation lying behind what became known as "Teddy" Roosevelt's "Big Stick" policy. The Cuban people were not entirely happy with it, but it was to some extent justified by the subsequent course of events in Cuba. The need arose for a formal intervention from 1906-1909, and troops landed again in 1912 to quell an insurrection in Eastern

⁸ Bacon & Scott, *The Military and Colonial Policy of the United States, Addresses and Reports by Elihu Root* xiv (1916).

⁹ Bemis, *The American Secretaries of State and Their Diplomacy* 196 (1958).

Cuba. Cuba was also used as a training ground for American soldiers during World War I. General Crowder visited the island from 1921-1923 to recommend financial and other reforms, which however, were not adopted.¹⁰

The Panama Canal Doctrine

The contemporaneous development of the Panama Canal with its concurrent needs for absolute security created what was for the United States perhaps its primary motivation for the policy of intervention in Latin American internal affairs. Secretary of State Charles Evans Hughes declared our policy in an address of November 30, 1923:

We have certain special policies of the highest importance to the United States. We have established a waterway between the Atlantic and Pacific oceans—the Panama Canal. Apart from obvious commercial considerations the adequate protection of this canal—its complete immunity from any adverse control—is essential to our peace and security. We intend in all circumstances to safeguard the Panama Canal. We could not afford to take any different position with respect to any other waterway that may be built between the Atlantic and Pacific oceans. Disturbances in the Caribbean region are therefore of special interest not for the purpose of seeking control over others but of being assured that our own safety is free from menace.¹¹

Charles Cheney Hyde, writing of Secretary of State Hughes,¹² commented as to this statement:

In thus enunciating what may be called the Panama Canal Doctrine, Secretary Hughes made clear the theory on which this country might be expected to act with respect to a particular area when no violation of the Monroe Doctrine was anticipated or threatened.

The United States declared itself possessed of intervening powers above and beyond those delineated by the Monroe Doctrine. Particular emphasis is placed on this declaration of policy because, although there was an apparent retreat under President Franklin D. Roosevelt's "Good Neighbor" theory and Pan Ameri-

¹⁰ Woolsey, *The New Cuban Treaty*, 28 Am. J. Int'l L. 530-34 (1934).

¹¹ Hughes, *The Pathway of Peace* 142, 162 (1925).

¹² 10 Bemis, *The American Secretaries of State and Their Diplomacy* 349 (1958).

canism, it has found re-expression to a degree in a recent statement by President Eisenhower as to our policy with respect to Guantanamo Bay.¹³

There has been a tapering off of the more distasteful preventive features of the Panama Canal Doctrine, which were perhaps exhibited in their most brusque form by the intervention in Nicaragua begun under President Calvin Coolidge and extending from 1927-1933.¹⁴ The first clear indication of the repudiation of the "Roosevelt Corollary" came in the "Clark Memorandum on the Monroe Doctrine," published in 1930, which sanctioned intervention under what was to become the Good Neighbor policy only when it was for the immediate protection of the legitimate rights of American citizens and was generally recognizable and acceptable under international law and international conventions. No right to intervene politically in internal affairs was retained.¹⁵

The Good Neighbor Policy

In 1932, President Franklin D. Roosevelt announced the Good Neighbor Policy in his inaugural address. He proved that he meant it with respect to Cuba when he did not intervene in the Cuban revolution of 1933. This revolution came about as a result of hard times in Cuba beginning in 1927 with the accumulation of sugar surpluses. President Gerardo Machado was forced out and replaced by former university professor, Dr. Grau San Martin. The real power behind this change, however, lay in the hands of a man who has become considerable more familiar, Sgt. Fulgencio Batista. He led a mutiny in the army by which he displaced all Cuban officers and became the leader of the armed forces. Personal political power came to rest in his hands when he was elected President on October 10, 1934.¹⁶

While these internal changes were taking place in Cuba, President Roosevelt indicated a willingness to assist with Cuba's economic restoration and reform and to commence negotiations for a revision of existing treaties. He renounced the policy of

¹³ Statement of the President, The White House, Nov. 1, 1960.

¹⁴ Bemis, *The United States as a World Power, a Diplomatic History, 1900-1950*, at 64-67 (1952).

¹⁵ *Id.* at 291.

¹⁶ Berle, *The Cuban Crisis*, 39 *Foreign Affairs* 41-45 (No. 1, 1960).

Russia would defend Cuba against "American aggression," Raul Castro's visit to Czechoslovakia and Moscow, and Cuba's appeal to the Security Council of the United Nations on July 18, 1960,²⁴ which resulted in a referral of the matter to the Organization of American States, there could remain little question on this point. Subsequent events have but continued this pattern.

The question that may perhaps be raised is, how deep into the mass of Cuban people do these changes penetrate? Is the change that Castro has sought to effect in Cuba a permanent one, or does the cry of Manolo Ray, head of Havana's underground anti-Red Popular Revolutionary Movement, express a more true feeling of what the Cuban people want? "Under the pretext of freeing us from Yankee Imperialism, we have been encircled with the yoke of Russian imperialism. Cubans! Rescue the Revolution from those who have betrayed it!"²⁵

What Do These Events Mean?

This question of whether a truly permanent and significant change has in fact come over Cuba is most important. It bears directly on a determination, as a matter of international law, of whether the Cuban government can invoke the doctrine of *rebus sic stantibus* in an effort to abrogate our treaty rights in Guantanamo Bay and the attendant issues of legal policy which must be resolved.

That the Castro government might seek to take Guantanamo from the United States, either by force or by international legal methods, has certainly raised itself as a possibility in recent months. A British writer in "New Statesman" of July 9, 1960, ventures the prognostication that all American property in Cuba, including Guantanamo, will be seized and that the only action the United States can take in the event of such open conflict will be armed intervention.²⁶

The Current American Policy Attitude

President Eisenhower, in his policy statement of November 1, 1960²⁷ has left no doubt that this is what would happen:

²⁴ Ministry of Foreign Relations, The Appeal of Cuba to the Security Council of the United Nations (1960).

²⁵ Time, Nov. 14, 1960, vol. 76, p. 36.

²⁶ Johnson, A *Caribbean Suez*, 60 New Statesman 43-44 (No. 1530, 1960).

²⁷ Statement of the President, The White House, Nov. 1, 1960.

While the position of the Government of the United States with respect to the Naval Base at Guantanamo has, I believe, been made very clear, I would like to reiterate it briefly.

Our rights in Guantanamo are based on international agreements with Cuba, and include the exercise by the United States of complete jurisdiction and control over the area. These agreements with Cuba can be modified or abrogated only by agreement between the two parties, that is, the United States and Cuba. Our Government has no intention of agreeing to the modification or abrogation of these agreements and will take whatever steps may be appropriate to defend the Base.

The people of the United States, and all of the people of the world, can be assured that the United States' presence in Guantanamo and use of the Base pose no threat whatever to the sovereignty of Cuba, to the peace and security of its people or to the independence of any of the American countries. Because of its importance to the defense of the entire hemisphere, particularly in the light of the intimate relations which now exist between the present Government in Cuba and the Sino-Soviet bloc, it is essential that our position in Guantanamo be clearly understood.

Nor has President Kennedy kept anyone wondering about his position. He said prior to his election:

We must use all the power of the Organization of American States to avoid Castro's interfering in other Latin American countries and force him to return Cuba to freedom.

We must state our intention of not allowing the Soviet Union to turn Cuba into its Caribbean base, and apply the Monroe Doctrine. We must force Prime Minister Castro to understand that we propose to defend our right to the naval base at Guantanamo. And we must show the people of Cuba that we agree with its legitimate economic aspirations—that we know full well their love for freedom, and that we shall never be satisfied until democracy returns to Cuba.

The forces that are struggling for freedom in exile and in the mountains of Cuba must be supplied and assisted. . . .²⁸

²⁸ The 26th of July Movement in the United States 21 (Bull. No. 5, 1960).

There has been no indication that he has deviated essentially from this position since he took office despite the Bay of Pigs fiasco. Although the possibility of open conflict may be receding, the break of diplomatic relations between Cuba and the United States on January 4, 1961, the subsequent invasion attempt, and the recent action of the Organization of American States concerning Cuba, to mention but a few of the most significant events, have certainly further intensified the already great danger that exists in this situation.

Out of the historical complex of facts and policy relating to the Cuban situation two primary questions of international legal significance have arisen which from their nature exemplify to a degree the necessary union of law and diplomacy so eloquently espoused by Professor Hardy Cross Dillard of the University of Virginia Law School. Their answer will not be found in the isolated realm of either discipline.

I. If Cuba seeks to abrogate the treaty of 1934, which reaffirmed our rights in Guantanamo until such time as we should abandon the base or mutually agree to a cancellation of the lease, what arguments are available to support her position in a hypothetical case before the World Court of International Justice and upon what theory would the United States base its reply?

II. If Cuba attacks the American base at Guantanamo, is the United States entitled as a matter of international law to defend the base by use of force under Article 51 of the United Nations Charter?

In the first of these two questions it is possible to visualize the emergence of a basic legal conflict which can be synthesized primarily into the idea of a controversy between two doctrines, *rebus sic stantibus* or change of circumstances, and *pacta sunt servanda* or sanctity of treaties. The resolution of this conflict will involve policy considerations as to the effect which each of the various contributing events and factors should have on the applicability of the respective doctrines, whether the decision making body be judicial or political, the variable being the relative weight which a particular type of decision making body might assign to each factor in reaching a conclusion.

The second question raises the controversy which might have to be resolved were the concept of territorial sovereignty and the

doctrine of self defense to be pitted against the concept of ultimate sovereignty.

II. ANALYSIS OF QUESTION I

The Castro Attitude

If Cuba seeks to abrogate the treaty of 1934, which reaffirmed our rights to Guantanamo until such time as we should abandon the base or mutually agree to a cancellation of the lease, it is apparent from the remarks of Dr. Fidel Castro, Prime Minister of Cuba, which he made at the eight hundred and seventy-second plenary meeting of the General Assembly of the United States on Monday, September 26, 1960, that Cuba has in mind the application of a theory that amounts essentially to either fundamental breach or, in the alternative, *rebus sic stantibus*. The following excerpt from his remarks gives some indication of his thinking on the matter:

The hysteria is being whipped up, and the imaginary danger of a Cuban attack against the base of Guantanamo is being bruited about.

But this is not all. Yesterday a United Press Information Circular appeared containing a declaration by United States Senator Styles Bridges who, I believe is a member of the Armed Forces Committee of the Senate of United States who said that the United States must be prepared, at any expense, to maintain its naval base at Guantanamo in Cuba.

He said: "We must go as far as necessary to preserve that base and defend the gigantic installation of the United States. We have naval forces there; we have military forces and we have the Marines, and if we were attacked we should defend it, for I consider it to be the most important base in the Caribbean area."

This member of the Senate Committee of the Armed Forces did not entirely discard the use of atomic weapons in the case of an attack against the base at Guantanamo. What does this mean? This means that not only is hysteria being whipped up, not only is a systematic preparation of the right conditions being indulged in, but we are being threatened with the use of atomic weapons. Among the many things that we can think of, one is to ask this Mr. Bridges whether he is not ashamed of himself to threaten anyone with atomic weapons, especially a small country like Cuba.

As far as we are concerned, and with all due respect, I must say that the world's problems are not settled by threatening or by sowing fear. Our humble people of Cuba is there. It exists, even though they may dislike the idea, and the revolution will go ahead, however much they dislike that. And besides, our humble and small people has to resign itself to its fate. And our people is not afraid. It is not shaken by this threat of the use of atomic weapons.

And what does this mean? That there are many countries that have American military bases but that they are not directed against the Governments that granted the concessions—at least, not as far as we know. In our case, we are in the most tragic position because this is a base in our insular territory, pointed at the heart of the Revolutionary Government of Cuba, in the hands of those who declare themselves the enemies of our country, of our revolution and our people.

In the entire history of bases set up anywhere in the world the most tragic case is that of Cuba—a base thrust upon us by force, in a territory that is unmistakably ours, that is a good many miles from the Coast of the United States, a base against the Government of Cuba, imposed by force and a constant threat and a constant cause for concern.

That is why we must say here that all this talk of attacks is intended, in the first place, to create hysteria in preparation of an atmosphere of aggression against our country and that we have never spoken one single, solitary word of aggression, or any word that might be taken as implying any type of attack on the Guantanamo base, because we are the first in not wanting to give imperialism a pretext to attack us.

We state this categorically and positively, but at the same time we also declare that from the moment when that country has become a threat to the security and tranquility of our people, a threat to our people itself, the Revolutionary Government of Cuba is seriously considering requesting within the framework of international law, that the naval and military forces of the United States be withdrawn from the Guantanamo base, from that portion of the national territory, and there will be no option but for the imperialist government of the United States but to withdraw its forces, because how will it be able to justify before the world its right to install an atomic base or a base which is dangerous to our people in a bit of

our national territory, in an unmistakable island which is the portion of the world where the Cuban nation is situated?

How will they be able to justify to the world any right to maintain and to hold sovereignty over a part of our territory? How will they be able to stand before the world and justify such an arbitrary procedure? And since it will be unable to justify itself to the world when our Government requests it, within the framework of international law, the Government of the United States will have no option but to abide by the canons of international law.²⁹

The case for Cuba is not entirely so clear as Dr. Castro would have us believe. But the situation does present interesting questions as to the applicability of the suggested theories.

Procedures Available

Before discussing the substantive aspects of these questions the procedural avenues available should be taken into consideration. Both the Charter of the Organization of American States, in Chapter IV on the Pacific Settlements of Disputes, Articles 20-23, and the United Nations Charter, in Articles 52 and 33-38 have expressly provided for the handling of problems of this nature.

The United Nations Charter in Article 52 provides for regional arrangements such as the Organization of American States and leaves to them the handling of local disputes wherever possible. In addition, the Pacific Settlement of Disputes may also be handled under the provisions of Chapter VI, where regional methods are unsuccessful or the parties have been unable to reach a settlement by negotiation, enquiry, mediation, conciliation, arbitration, or judicial settlement. Under such circumstances the Security Council may take up the problem in order to determine whether its continuance will be apt to endanger the maintenance of international peace and security.

Normally legal disputes will be referred to the International Court of Justice. That court has jurisdiction, where the parties have consented to it, to decide all legal disputes concerning the

²⁹ *Ibid.* This is a translation of a speech delivered by Dr. Fidel Castro at the eight hundred and seventy-second plenary meeting of the General Assembly of the United Nations, Monday, Sept. 26, 1960. *Id.* at 20-21.

interpretation of treaties and questions of international law such as are involved here.

Assuming that the controversy has not been settled by other methods of peaceful procedure, and laying aside the substantial jurisdictional hurdles that might have to be overcome, let us suppose that the case has come before the International Court of Justice. Since the United States has taken the position as a matter of policy that it does not wish to abandon its treaty rights and has no intention of mutually agreeing to withdraw, which is entirely within its treaty rights, the burden would rest on Cuba to show why it should be released from its treaty obligations as a matter of law.

Theories of Approach: Aspects of Fundamental Breach

There are at least two theories on which she might proceed. One would be to attempt to show that the United States has in some way fundamentally breached the terms of the lease thereby establishing grounds for abrogation or forfeiture in accordance with basic principles of international law as restated in Articles 18, 19, and 20 of the Law of Treaties,³⁰ which are used here for purposes of discussion without consideration of their merits or demerits as a statement of the law. Grounds which might be applicable to this lease would be nonpayment of rent, disclaimer of the ultimate sovereign's title, abandonment of the premises, violation of restrictions on use, or illegal use.

Since the lease itself contains no express provision for forfeiture for nonpayment of rent, and since there has not been such a forfeiture, this possibility obviously would fail. There is no indication that any American action has thus far amounted to a disclaimer of Cuba's ultimate sovereignty, but if this could be shown by Cuba, it might succeed in obtaining a forfeiture under common law principles of landlord and tenant.³¹ Since there has clearly been no abandonment of the premises, this argument would not apply.

There are a number of restrictions on use and obligations for maintenance of fences and enclosures which if breached could perhaps amount to grounds for forfeiture. For example, Article

³⁰ International Law Comm'n, 1957 Yearbook, Vol. II, Law of Treaties, Art. 18-20, at 30-32 (A/CN.4/107) (1958).

³¹ *Merryman v. Bourne*, 76 U.S. (9 Wall.) 592 (1869).

III of the 1903 lease provides that no commercial or industrial enterprises can be established on the base and Article IV provides for deliverance of fugitives from justice taking refuge on the base to appropriate Cuban authorities. If Cuba could show that these provisions had been violated, this might justify forfeiture although the lease itself does not expressly provide that this will result.

Illegal use in a broad sense would probably be the ground for suspension which Dr. Castro and his government would have the greatest possibility of developing under the rule of Articles 18 and 19.³² But unless the United States were to use the base in open support of forces hostile to the Castro regime, as for example, to harbor fugitives from Cuban justice, the argument, hedged about as it is by the doctrine of *pacta sunt servanda*, would be difficult to apply. Certainly the United States could argue effectively that its use of the base has been strictly in accord with the terms of the lease up to the present time.

Charlton v. Kelly, Sheriff

In *Charlton v. Kelly*,³³ decided in 1913, which arose under an extradition treaty between the United States and Italy, it was contended that the treaty was abrogated by Italy's failure to surrender her citizens when demanded by the United States and enacting a law forbidding extradition of her citizens. As to this point, the court held that Italy's violation of the treaty, while it might have justified the United States in denouncing the treaty, did not automatically abrogate it. The Court regarded abrogation of what was then a voidable treaty, because of violation by one party, as a political decision for the executive department.

Applying the rule of this case to the potential argument that might develop for Cuba, it would first be necessary for her to show that the terms of the lease agreement had in some significant respect been violated by the United States. Such a showing would then render the treaty voidable at the executive discretion of Cuba and any action she might thereafter take as an exercise of such discretion would at least be defensible when a final ruling on the point might later be made in the World Court.

³² International Law Comm'n, *op. cit. supra* note 30, at 30-31.

³³ 229 U.S. 447 (1913).

In the event that such violation of treaty obligations by the United States should occur, under Article 27 of the Draft Convention of the Law of Treaties³⁴ the legally correct procedure for Cuba to take after she has made the political decision to abrogate the lease would be to seek from a competent international tribunal a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such state.

Section 20 of the Law of Treaties³⁵ would amplify this procedure by requiring Cuba to set out the grounds for a claim of fundamental breach in a reasoned statement to be communicated to the United States for consideration. If the United States were to contest the matter within a reasonable time, Cuba would then take the matter to an appropriate tribunal agreed upon by the parties or to the International Court of Justice if the parties agreed on no other tribunal. Only if the United States were to decline to litigate the matter within a reasonable time would Cuba be justified in taking unilateral action to declare the treaty at an end.

Rebus Sic Stantibus: An Alternative

The foregoing method of abrogation is not provided for in the Treaty itself, but it is recognized as a matter of international law.³⁶ There is yet another possibility where essential facts have changed and especially where the treaty, as in this case, contains no time limitation on the continuation of its effectiveness. Under such circumstances, the doctrine denominated *rebus sic stantibus*³⁷ could be applicable. A Machiavellian power politician such as Castro must certainly see strong possibilities in it.

This doctrine appears to have originated in certain provisions of Roman Law.³⁸ Analogous principles seems to have found their places in numerous systems of private law.³⁹ In the field of inter-

³⁴ Draft Convention of the Law of Treaties, Article 27, 29 Am. J. Int'l L. 1027 (Supp. 1935).

³⁵ International Law Comm'n, *op. cit. supra* note 30, at 31-32.

³⁶ *Id.* at 30-32.

³⁷ Draft Convention of the Law of Treaties, Article 28, 29 Am. J. Int'l L. 1096 (Supp. 1935).

³⁸ Hill, *The Doctrine of Rebus Sic Stantibus in International Law*, 9 U. of Mo. Studies 18 (No. 3, 1934).

³⁹ Lauterpacht, *The Function of Law in the International Community* 272-76 (1933).

national law, the doctrine has met with considerable controversy as to the practical consequences of admitting its applicability although it is theoretically attractive. G. Fitzmaurice, Special Rapporteur of the Law of Treaties for the International Law Commission, prefers to regard *rebus sic stantibus* as an objective principle of law and as "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."⁴⁰ Dr. Castro would undoubtedly concur in his conclusion on this point. Some authorities, such as Bynkershoek, Wildman, Strupp and Lammasch would reject the doctrine of *rebus sic stantibus* altogether as would Grotius, Vattel and Klüber to a large extent. It has in any event been recognized in the more recent efforts to codify the law of treaties, particularly the Harvard Draft Convention of the Law of Treaties Article 28⁴¹ and Articles 21-23 of the International Law Commission Law of Treaties,⁴² which are utilized for the sake of discussion herein, without going into their relative theoretical merits and demerits.

Applications of the Doctrine

There have in fact been no recent applications of the doctrine by an international tribunal. The closest approach came in the well-known *Case of the Free Zones of Upper Savoy & the District of Gex*.⁴³ This case is regarded as a recognition of the principle by the court, although there is no clear indication as to what extent a change of conditions may effect the continuation of treaty obligations.⁴⁴ The Attorney General of the United States recognized that the principle is well-established in international law and applied it with respect to the International Load Line Convention⁴⁵ which was implicitly assumed to be based on the continuance of normal peacetime conditions in international trade.

More recently there have been some applications or refusals

⁴⁰ Fitzmaurice, Commentary on the Articles, in International Law Comm'n, 1957 Yearbook 59 (A/CN.4/107) (Vol. II, 1958), in the conclusion of which he cites Lord Sumner in *Hiri Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 510.

⁴¹ Draft Convention of the Law of Treaties, *supra* note 34, at 1096.

⁴² International Law Comm'n, *op. cit. supra* note 30, at 32-33, Art. 21-23.

⁴³ Judgment of June 7, 1932, P.C.I.J., ser. A/B, No. 46, at 156-58; 2 Hudson, World Court Reports 448, 553.

⁴⁴ Lauterpacht, The Development of International Law by the Permanent Court of International Justice 43 (1934).

⁴⁵ International Load Line Convention, 47 Stat. 2288, London, July 5, 1930; 4 Ops. Att'y Gen. 119 (1941).

to apply the doctrine in private law cases in which the question of the continued existence of a treaty in light of changed circumstances has been brought up. A brief review of some of the more significant of these opinions decided since 1932, when the *Free Zones* opinion was handed down, will perhaps be useful in developing some notion of how the doctrine may be applied today.

In *Barcs-Pakrac Ry. v. Yugoslavia*,⁴⁶ decided in 1934, arbitrators appointed by the League of Nations were called upon to determine the continuing effect on Yugoslavia of clauses in a 100-year-railroad-operating contract with plaintiff which had been concluded in 1885 when all of the territory served by the railroad was in Austria-Hungary. The particular point in issue was whether, in view of the upheaval created by World War I and its aftermath, as a result of which, by the Treaty of Trianon of 1920, the territory on which the railroad was located had been transferred to Yugoslavia, the operating contract should apply without revision. The arbitrators concluded that Yugoslavia was bound to maintain the principal features of the contractual position of the plaintiff railway as they existed prior to the war, but was not bound to observe literally all the terms of the contracts especially insofar as they might have been affected by changed conditions in Europe, thus giving at least some effect to the doctrine of *rebus sic stantibus* without denominating it as such.

Bertacco v. Bancel & Scholtus, a French case decided in 1936,⁴⁷ was an action for damages for the death of plaintiff's deceased son. A question arose as to whether plaintiff should be required to give security for costs under Article 166 of the Code of Civil Procedure. Under normal conditions it was admitted that treaty provisions would exempt an Italian subject from furnishing such security, but it was argued that the effect of the proclamation of sanctions under the League Covenant, Article 16, against Italy was to suspend treaties between France and Italy and leave plaintiff as a subject of a state with whom there

⁴⁶ League of Nations 15th Ass. 1679-86 (1934) (arbitrators appointed by resolution of the League of Nations of January 17, 1934); [1934] Ann. Dig. 424-31 (No. 190).

⁴⁷ [1937] Ann. Dig. 422-23 (No. 201), Gazette du Palais, March 24, 1936, Sirey Recueil Général III. 87 (1936). The case was decided by the Tribunal de Commerce de Saint Etienne on January 17, 1936.

was no existing treaty in force. The court agreed with this argument, noting that in every international treaty there is always an implied resolute condition in cases where one of the contracting parties finds it impossible to carry out its bargain. The change of economic relations between France and Italy arising out of the application of sanctions imposed by the League of Nations made this holding, which recognized the doctrine, necessary since capital export restrictions imposed by Italy as a result of the sanctions would have otherwise made it impossible to recover costs from an Italian subject.

(*Ex parte*) *Feldman Publishing Co. & Antin v. Rigaud*, a French case decided in 1944,⁴⁸ involved a claim for reduction of rent on business premises located in Paris based on a Convention of February 28, 1882, and Agreements of May 21-25, 1929, between France and Great Britain. The Tribunal of the Seine held that the rupture of diplomatic relations between the French (Vichy) government and Great Britain after the Mers-el-Kebir (Oran) incident had put an end to the treaties' existence at that date between the two states. On appeal, the lower court was reversed and the claim for reduction of rent was allowed. The court held that the Convention and the Agreements remained in force and that the breach of diplomatic relations did not amount to a declaration of war, and that France was not *de jure* at war with Great Britain. This case is interesting for the point as to the effect of breach of diplomatic relations between a new French regime which had become hostile to the continuing British government. The analogy to the present Cuban-American situation is rather clear although the nature of the treaties involved is of course distinguishable. The question as to the depth to which the governmental change penetrated into the mass of the French people would also be pertinent in this case.

Gevato v. Deutsche Bank, decided by the District Court of Rotterdam in 1952,⁴⁹ involved the question of whether the Hague Convention on Civil Procedure of 1905 was still in force between Holland and Germany, or having been suspended as

⁴⁸ [1945] Ann. Dig. 278-79 (No. 92), [1945] Dalloz Jurisprudence 24 (note by Professor Basedevant), Gazette du Palais, May 9, 1944 (containing arguments of Solicitor-General Laurens).

⁴⁹ [1952] Int'l L. Rep. 424-27, [1952] N.J. (No. 327). The case was decided by the District Court of Rotterdam, January 18, 1952.

between them during the war of 1940-45, was again in force. The court regarded the Convention as still in force and found the intervening state of war did not bring it definitely to an end. The appearance of a new government (West German Federal Republic) on the territory of an already existing state did not mean that international rights previously acquired or international obligations previously undertaken by it came to an end. They continued to be vested in and to bind the state in its new constitutional form. The convention, not having been denounced at any time in accordance with its terms, remained in full force and effect. This case merely reiterates the well-established point of international law that changes of government in and of themselves are not sufficient to abrogate a treaty as a matter of law. This rule applies with equal validity to the Cuban situation, but there are, of course, other factors to consider.

In a Swiss case, *Stransky v. Zivnostenska Banka*, decided in 1955,⁵⁰ it was argued that the Czechoslovak currency of 1953 by which certain assets of Czechoslovak nationals, including the contested claims of plaintiff, were written off without compensation, amounted to a fundamental change unforeseen by Switzerland when it had concluded a compensation agreement on January 1, 1950, with Czechoslovakia which provided that claims for blocked assets in Czechoslovak banks should not be entertained by Swiss courts. In rejecting the plaintiff's effort to have the Swiss court take cognizance of his claim, the court explicitly mentioned the doctrine of *rebus sic stantibus* and noted that the Federal Council, which was responsible for the international relations of Switzerland, had not taken any steps toward its invocation and that any such effort would undoubtedly encounter severe difficulties. This case seems to indicate that the doctrine is a tool for the use of states only and not to be invoked by private parties for their benefit. The changes involved here, on the basis of which its invocation was sought, were distinguishable from those which Cuba could suggest, and Cuba would undoubtedly seek to invoke the doctrine in her own name so this case should present no problems for her.

Before proceeding with an attempt to apply to the doctrine

⁵⁰ [1955] Int'l L. Rep. 424-27, [1955] Arrêts du Tribunal Fédéral Suisse 81(I.), at 222.

the facts of the Cuban situation, a few words of caution should be added about *rebus sic stantibus*. Change of the motive which led a party to enter into a treaty, without a change in the object or purpose for which it was effected, affords no ground for application of the principle *rebus sic stantibus*.⁵¹ The cautionary words of Brierly should also be noted:

We may well hold that the obligation of a treaty comes to an end if an event happens which the parties intended, or which we are justified in presuming they would have intended, should put an end to it; the more difficult problem concerns an obligation which the parties did not intend to be ended, but which it would be oppressive to enforce, and which will probably in fact be violated in the events which have happened. It is because so many writers have sought to find in *rebus sic stantibus* a solution for this latter problem that the doctrine has become one of the most controversial in international law. But it is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for problems of a changing international world. That is not so; for many of these problems—and oppressive treaties are one of them—the only remedy is that states should be willing to accord with new needs, and if states are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences. Law is bound to uphold the principle that treaties are to be observed; it cannot be made an instrument for revising them, and if political motives sometimes lead to a treaty being treated as ‘a scrap of paper’ we must not invent a pseudo legal principle to justify such action. The remedy has to be sought elsewhere, in political not in judicial action.⁵²

Cuba must in effect walk a rather narrowly defined judicial tight rope if the doctrine is to be regarded as of any value at all. There must be a juridical basis for its application, not merely a political one. Does Cuba have such a basis? Is her problem fit for adjudication under this controversial principle?

The Harvard Approach

Let us first analyze her problem in terms of Article 28 of the Harvard Draft Convention of the Law of Treaties.⁵³ It provides:

⁵¹ Fitzmaurice, *op. cit. supra* note 40, at 61.

⁵² Brierly, *The Law of Nations* 264 (5th ed. 1955).

⁵³ Draft Convention of the Law of Treaties, *supra* note 34, at 1096.

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitely until a declaration to this effect has been rendered by competent international tribunal or authority.

This article makes no provision as to the unlimited duration of the treaty nor does it necessarily limit its scope to two-party compacts as we shall see is the case in the International Law Commission draft. Four questions would seem to require an answer before a determination as to the applicability of Article 28 can be made.

(1) Did the parties enter into the lease with reference to the existence of a certain set of facts?

(2) Was the continued existence of this state of facts regarded by the parties as a determining factor moving them to undertake the obligations of the lease?

(3) Has this state of facts been essentially changed?

(4) Is this change so injurious to one party that under a right of necessity it should be permitted to terminate the treaty?

Insofar as question (1) is concerned, there is no specific reference in the treaty of 1934 or the agreement and lease of 1903 to the existence of any facts related to the changes which have occurred in Cuba in recent years. Only by implication can it be suggested that cordial and friendly relations between compatible forms of government were part of the background to the ratification of this treaty.

In considering question (1) it should be re-emphasized that changes in the form of government of a state are not sufficient in and of themselves to terminate or modify its treaties.⁵⁴ But

⁵⁴ *Id.* at 1044. See also Hackworth, 5 Digest of Int'l L. 360 (1944).

the argument is worthy of consideration that the governmental change to a Communistic system currently being undertaken by Cuban leaders coupled with a breach of diplomatic relations and an evident hostility of attitude on the part of both signatory nations toward one another are perhaps more than the ordinary political change. It is certainly arguable that at the time the treaty was ratified it was felt that essentially compatible systems of government would continue to exist in both countries, and certainly that the countries should not develop diametrically inimical ideologies.

With respect to question (2) it seems entirely reasonable that continued existence of a state of facts in terms of an overall international relationship could be regarded as a determining factor in the original undertaking. It would certainly seem strange for a country to permit the maintenance of a base on its territory by another hostile power under any circumstances.

Question (3) can be answered in the negative in that United States policy has not changed fundamentally since 1934. Our policy reasons for maintaining a base at Guantanamo have remained for the protection of the Panama Canal and our own self defense in the Caribbean area.

Furthermore, history shows that the existing need for many of the reforms which Fidel Castro has brought to Cuba is not a change of any essential facts that were relied on in 1934. There was need for reform then and there will probably always be such a need to varying degrees. The accomplishment of these reforms is not inimical to American purposes, but rather should in many instances receive American encouragement as it did in 1934.

The only facts with reference to which the treaty can impliedly be said to have been made and which appear to have changed are the character of the Cuban government and its ideology and the nature of the diplomatic relationship between that government and the United States. Real questions exist as to whether the changes apparent in Cuba's government and its attitude toward America represent any basic modification of the attitude of a majority of the Cuban people to the United States and its people and whether Communism has come to Cuba permanently. More time for solidification of conditions will be re-

quired to give the definite answer to this point. It has been suggested that a question of this nature may have been bothering the court in *Ex parte Feldman Publishing Co. & Antin v. Rigaud*, where the doctrine was found inapplicable.

The existence of this question suggests part of the reason for the rule of international law that a change in the form of government or from one ruler to another and nothing more does not terminate or modify a treaty. In spite of the stability of American policy as to Guantanamo and the continuing underlying need for reform in Cuba, a change to a fundamentally contrary Communist system, when considered in connection with the prevailing American attitude toward such a form of government, could be regarded as considerably more than a simple political change and could, in the opinion of this writer, be a ground for invocation of the doctrine of *rebus sic stantibus*.

The reason for this conclusion is suggested by the answer which must be given to question (4) if we assume that Communism is a permanently established system of government in Cuba. As a matter of sheer necessity, it would no longer be tolerable for Cuba to permit an American base to remain on her territory; she could no more do this than could the United States permit Russia to establish or maintain a missile base on our territory. Such a base could then be said to have become a threat to the vital requirement of self preservation. The essential political relations which produced the treaty of 1934 would no longer be conceivable.

The International Law Commission Approach

Articles 21-23 of the International Law Commission Law of Treaties suggest some additional factors which, if they have any effect at all, will operate primarily to strengthen the argument for applicability of the doctrine although they do raise one obstacle which may be most difficult for Cuba to overcome.

Article 21 specifically applies to treaties which have no provision, express or implied, as to duration of the treaty. Such is the case here. A fundamental and unforeseen change in essential circumstances can be argued for in much the same manner as was done with respect to Article 28. Article 21 prohibits the use of *rebus sic stantibus* where termination can be effected under the terms of the treaty itself. The United States policy precludes

any possibility of this since the treaty itself requires mutual agreement to any modification or termination.

Article 22 would limit the application of the principle primarily to the field of bilateral treaties. This would by no means preclude its application in the instant case, but would perhaps be a point in its favor.

The character of the change is the crucial factor which limits the applicability of the doctrine. The change can only be regarded as essential for the purpose of invoking the principle if it is an objective change and not merely a subjective modification in the attitude of the party invoking the principle. This requirement of objectivity is not specifically delineated by the Harvard Draft. It could give Castro much difficulty. The same point that was made with respect to question (3), when discussing the Harvard Draft, would enter in here—namely that more time will perhaps be required to determine whether an objective change in the Cuban nation has in fact occurred, as opposed to a change in the attitude of its government.

The requirement previously discussed that the change must relate to a state of affairs with reference to which both parties contracted and the continued existence of which without essential change was envisaged by both of them as a determining factor moving them to enter into the treaty is present in Article 22. The Article would also require the change to have the effect of destroying or completely altering the foundation of the obligation based on the situation referred to above. Castro can certainly argue this point with vigor if he is able to consolidate his power and eliminate opposition. He should have little difficulty with the requirement that the change must have not been reasonably foreseeable by the parties at the time of the treaty.

In addition to requiring that the treaty have no provision for termination, Article 22 also requires that a party seeking to take advantage of a change do so within a reasonable time. Cuba has already initiated this process with its appeal to the Security Council in the summer of 1960, which, however, may have been a bit premature if we regard the change as still incomplete. It is quite probable that she will waste no time in attempting to apply the doctrine when she feels the moment has arrived.

Article 22 (3) (iii) may perhaps give Castro the greatest

trouble. It precludes the application of the doctrine where the change of circumstances has been caused or directly or proximately contributed to by the act or omission of the party invoking it. The United States could quite reasonably develop this point against him.

The Argument of The United States—Pacta Sunt Servanda

This is not the only point which might be urged by the United States. It can stand firmly supported by a doctrine that is far more basic to international law than is *rebus sic stantibus*. It has been alluded to previously and is the principle of *pacta sunt servanda* or sanctity of treaties.

This doctrine has its origins in ancient times when it was developed by the Chaldeans, Egyptians and the Chinese with certain religious overtones. The principle also was influential among the Islamic peoples and was greatly developed by Christianity. Its influence is seen in the Koran and the Bible. It has been developed by most of the great legal thinkers down through the ages from Bodin, Grotius, Cattel, Hobbes, Spinoza, and Heffter, to Jellineck, Anzillotti, and Tripel. But most of these men also limited their advocacy of *pacta sunt servanda* in a way which left at least some room for the principle of *rebus sic stantibus* to creep in under appropriate circumstances.⁵⁵

Pacta sunt servanda can in any event be regarded as a general principle of law which exists out of necessity in relations between states. It has been adhered to by numerous statesmen among whom was Secretary of State Cordell Hull, who happened also to be in office at the time the Treaty of Relations of 1934 with Cuba was signed. In a speech delivered on July 16, 1937, he said of American foreign policy:⁵⁶

⁵⁵ Hackworth, *op. cit. supra* note 54, at 164.

We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations.

⁵⁶ Wehberg, *Pacta Sunt Servanda*, 53 Am. J. Int'l L. 775-86 (1959). de Taube, *L'inviolabilité des traités*, 32 Recueil des Cours 299 (II, 1930).

He could very well have been talking about the Cuban treaty with entire relevance.

The doctrine also finds expression in the preambles of the League Covenant and the United Nations Charter and in Article 5 of the Charter of the Organization of American States. It has been recognized in numerous arbitration and law cases. For example the International Court of Justice in its advisory opinion of May 28, 1951, on Reservations to the Genocide Convention stated that:

[N]one of the contracting parties is entitled to frustrate or impair by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.⁵⁷

The foregoing analysis brings into focus the important conflict of legal doctrines, not to mention the diplomatic problem, which must be resolved in the handling of the Guantanamo and indeed the entire Cuban problem. Having examined the potentially applicable legal approaches, the conclusion remains reasonable that if the doctrine of *rebus sic stantibus* does have any vitality and meaning in international affairs, and if matters which raise questions of international law are appropriate for a judicial as opposed to a political decision, then the continued existence of our lease of the naval base at Guantanamo Bay may well be one of those situations to which the doctrine might be applied.

III. ANALYSIS OF QUESTION II

Dr. Castro's remarks to the United Nations give the impression that he will not be so foolhardy as to attempt to retake Guantanamo Bay by force. He is undoubtedly aware of the myriad of pitfalls that would await him both in terms of his international legal obligations and the military problem which in itself would be very difficult to avoid. But it is nonetheless of interest from the American point of view to know where we would stand as a matter of international law if such an unlikely eventuality should transpire.

The Nature of our Rights to a Leased Base

The answer to question II depends to some degree on the answer to a collateral question which must first be determined.

⁵⁷ [1951] I.C.J. 21.

That question relates to the nature of the American rights in Guantanamo. Is the territory of that base legally of such a nature as to constitute it a part of the body of a "member," the United States, as that word is used in Article 51 of the United Nations Charter, or is it on the other hand still a part of the body of Cuba for this purpose?

The rights of the United States in Guantanamo stem essentially from the language of Article III of the Agreement for the Lease of Coaling or Naval Stations quoted *supra*. Under that agreement the United States continues to recognize the "ultimate sovereignty" of Cuba over the area. On the other hand, Cuba consents that during the period of occupation of the area by the United States, which is of indefinite duration, the United States shall exercise complete jurisdiction and control over and within the base area.

Territorial Sovereignty versus Formal Sovereignty

Mr. Bishop, in his casebook on International Law, indicates that the rights conferred upon the United States under this lease amount to "territorial sovereignty."⁵⁸ Mr. Fenwick notes that within recent years states have frequently resorted to long term leases "as a means of securing control of territory without prejudicing the formal sovereignty of the lessor state."⁵⁹ He indicates that the sovereignty of the lessor state thereby becomes more nominal than real, and he characterizes the Cuban lease as a transfer of jurisdiction over territory and not of persons.

Mr. Fenwick also distinguishes the lease of Guantanamo from a servitude saying that it is not properly to be classed as such because "the lessor state loses possession and use of the land by lease although it retains formal sovereignty over it."⁶⁰ A servitude is simply an obligation on the part of the state in possession of the territory to permit a certain use of the land by or in favor of another state or states.

Relevant American Case Law

Under varying circumstances, a number of cases have arisen which have concerned or touched upon the nature of American

⁵⁸ Bishop, *International Law* 300 (1953).

⁵⁹ Fenwick, *International Law* 367-68 (1948).

⁶⁰ *Id.* at 387.

rights in Cuba in general and in Guantanamo in particular.

The first of these was *Neely v. Henkel* (No. 1),⁶¹ decided in 1901. The case involved a public employee of the Department of Posts in Havana, Cuba, who was charged with embezzlement or criminal malversation of public funds. The evidence in the case showed probable cause for the belief that he was guilty of an offense defined in an act of Congress of June 6, 1900,⁶² and also of violation of the criminal laws of Cuba.

Neely, having been arrested in New York, presented an application for a writ of *habeas corpus*, seeking release from restraint in extradition proceedings brought about by the United States for his removal to Cuba under the Act of June 6, 1900. That act provided that in the case of certain crimes including embezzlement, which were committed in a foreign country occupied by or under the control of the United States, if the accused should flee from justice therein to the United States, he should be returned upon the request of the military governor or chief executive of such foreign country following extradition proceedings held in a federal court.

The applicability of this act to the case depended upon whether Cuba was deemed to be a foreign country within its meaning. After reviewing the historical background of the situation in Cuba, the Court came to the conclusion that Cuba is a foreign territory. The Court stated: "It cannot be regarded, in any constitutional, legal or international sense, as a part of the territory of the United States."⁶³ The Court justified the Congressional power to pass the act in question as a measure to give force and efficacy to the provisions of the treaty with Spain.

An Attorney General's Opinion

This decision clearly leaves any rights we may have in Guantanamo to be derived solely from our lease with Cuba. The question of whether the Naval Base was to be regarded as a possession of the United States within the meaning of the Tariff Act of September 21, 1922,⁶⁴ was considered by the Attorney General in an opinion of March 2, 1929.⁶⁵ After noting the

⁶¹ 180 U.S. 109 (1901).

⁶² 31 Stat. 656 (1900).

⁶³ 180 U.S. at 119.

⁶⁴ 42 Stat. 858 (1922).

⁶⁵ 35 Ops. Att'y Gen. 536 (1929).

background of the lease, the Attorney General pointed out that the leased territory was used exclusively for public purposes of the United States under Regulations of the Navy Department. No effort was made to extend our ordinary tariff laws or any other customs requirements to the station except that Navy mail clerks acting on their own interpretation of Article 359, Customs Regulations of 1923, had sometimes considered parcels subject to duty when delivered upon vessels within the leased area, but otherwise when delivered ashore.

This distinction was supposedly based on the view that the station is not a "possession" of the United States, but that ships anchored there are "in waters of the United States" within the meaning of Article 359. It provides different marking procedures for articles of foreign origin received for delivery on board United States Naval vessels when in "waters of the United States" and when in "foreign waters."

The Attorney General analogized our Guantanamo Base to the Panama Canal Zone, which had been previously declared not a possession of the United States within the meaning of the term used in the tariff act. It was rather a "place subject to use, occupation and control of the United States for a particular purpose, to wit, the construction and maintenance of a ship canal connecting the waters of the Atlantic and Pacific oceans."⁶⁶

After comparing the terms of the documents involved, the Attorney General reached the same conclusion as to Guantanamo and held that goods with a foreign origin remain dutiable notwithstanding that they have come immediately from or through the Naval station.

A Cuban Decision

The Cuban Supreme Court considered a customs question with respect to Guantanamo in *In re Guzman & Latamble* decided on February 12, 1934.⁶⁷ The case involved defendants who had been found guilty of importing three hogs from the United States Naval Station at Caimanera on Guantanamo Bay, into a neighboring place in Cuba. The defendants claimed that the hogs had already been in Cuba when they were at the Naval

⁶⁶ 27 Ops. Att'y Gen. 595 (1909).

⁶⁷ [1934] Ann. Dig. 112 (No. 43).

station, and therefore they had not brought them in without payment of duties.

Upon appeal by the defendants the court held that the conviction must be affirmed for the reason that "the territory of that Naval station is for all legal effects regarded as foreign."⁶⁸

This rather sweeping language on the part of the Cuban Court appears at a glance to leave Guantanamo in somewhat of a vacuum in so far as the application of customs laws is concerned. However, the provisions of Article II of the Lease of Coaling and Naval Stations offers an explanation for the conclusion reached by the Cuban Court, if not for the sweeping statement as to the foreign character of the base "for all legal effects."

Article II makes Guantanamo an area for free importation of all kinds of materials, merchandise, stores and munitions of war for exclusive use and consumption therein. Any vessel discharging its cargo outside of the base area must do so at a regular port of entry for the Republic of Cuba and is subject to its customs laws and regulations and to the payment of corresponding duties and fees. The lease also contains a provision prohibiting the transportation of said materials and merchandise from the leased area into Cuban territory. Hence the fallacy of the defendant's claim in *In re Guzman & Latamble* is exposed.

The declaration as to the territory of the naval station is perhaps explicable by focusing on the use of the word *territory*, which, as has been pointed out in previous discussion, does in fact pass under the sovereignty of the United States by virtue of the lease. It is quite probable that this territorial sovereignty was all that the Cuban court was referring to when it characterized the base as "for all legal effects . . . foreign."

Vermilya-Brown v. Connell

The Cuban decision does seem to raise a question as to the necessity for the Attorney General's conclusion discussed previously. This is especially true when we consider the majority opinion in *Vermilya-Brown v. Connell*⁶⁹ decided in 1948 by the Court in a five to four opinion.

⁶⁸ *Ibid.*

⁶⁹ 335 U.S. 377 (1948).

The case involved the question as to whether a leasehold of a military base on the Crown Colony of Bermuda, which was obtained by a lease executed by the British government in 1941,⁷⁰ was a "possession" of the United States for the purposes of applicability of the Fair Labor Standards Act of 1938⁷¹ to employees engaged in construction work there.

The Court of Appeals for the Second Circuit had held that the Act applied to the Bermuda base,⁷² reversing the district court's holding that the applicability of the Act was a political question for the executive and legislative branches of the government.⁷³

The Supreme Court predicated its views on "the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense"⁷⁴ of being a part of the national domain. The sovereignty having been determined by prior executive action, the Court proceeded to examine the status resulting from this prior action.

The court went on to point out that regulation of the actions of American citizens by Congress does not depend in any sense upon American sovereignty over the area in which the actions take place, such power being derived from Article IV, sec. 3, cl. 2, of the Constitution, authorizing Congress to make "needful Rules and Regulations respecting the Territory or other property belonging to the United States."

The agreement granting American power over the leased area leaves no doubt that the United States is authorized by the lessor to provide for maximum hours and minimum wages within the leased area. In broad term, it gave the United States all such powers as may be necessary for the accomplishment of its purposes there and withdrew British control in any instances where it might conflict with American rights. None of its provisions made any stipulation as to the particular power to regulate overtime pay of workers. The applicability of the Fair Labor Standards Act then reduced itself to a question of statutory construction.

⁷⁰ 52 Stat. 1560, 1572, 1576, 1590 (1941).

⁷¹ 52 Stat. 1060 (1938).

⁷² 164 F.2d 924 (2d Cir. 1947).

⁷³ 73 F. Supp. 860 (S.D. N.Y. 1946).

⁷⁴ 335 U.S. 377, at 380-81.

The Court pointed out in a comparative survey of the other American leased bases that "the United States was granted by the Cuban lease substantially the same rights as it has in the Bermuda lease."⁷⁵

The word "possession," though not indicated as expressly inclusive or exclusive of the leased areas in the legislative history of the act, was construed by the court to include such bases as in keeping with the court's interpretation of what Congress would have said under the circumstances. This conclusion was fortified by analogous situations which are pointed to as exemplary of congressional purpose. The court noted the extension of the Longshoremen's and Harbor Workers' Compensation Act,⁷⁶ to Guantanamo Bay and other bases by the Defense Bases Act of 1943⁷⁷ which lists Guantanamo Bay and the Canal Zone as "possessions."

From this opinion, the inference can be suggested, on the basis of dicta, that the United States Supreme Court regards Guantanamo Bay as a "possession" of the United States at least for the purposes of the Fair Labor Standards Act if not in a broader sense.

In the dissenting opinion, Mr. Justice Jackson has some interesting observations to make in which he is joined by the Chief Justice, Mr. Justice Frankfurter and Mr. Justice Burton. The minority questions whether a lease equals a possession and would distinguish Bermuda's juridical and political footing from Alaska, Hawaii, Puerto Rico, Guam, the Samoan Islands, the Virgin Islands, and Canal Zone which the majority lumped into the same category.

The dissenters would draw the line as to what constitutes a possession on the basis of whether there has been a cession of sovereignty and supreme authority and point to background material to show that this was clearly not done here. The commerce power, according to the minority, is left with very little to regulate in an area set up primarily for military purposes. The ill effects on foreign policy of the decision are also detailed. It is pointed out that the Court alone among responsible agencies

⁷⁵ *Id.* at 383.

⁷⁶ 44 Stat. 1424 (1927).

⁷⁷ 56 Stat. 1035 (1943).

of the United States has ruled Bermuda a possession, contrary to the urgings of the Department of Justice, the Department of State, and a ruling of the Wage and Hour Administrator.⁷⁸

In an effort to destroy the effect of the majority's analogy to Guantanamo Bay, the minority points to the Attorney General's opinion previously discussed, to a failure by the State Department to list the Base as among our "non-self governing territories,"⁷⁹ and to the fact that the Administrator of the Fair Labor Standards Act has not listed it among our possessions.⁸⁰ From the treatment accorded Guantanamo, the minority feels that its view as to Bermuda is confirmed.

If these factors are insufficient a distinction is suggested between Guantanamo and the bases acquired by lease from foreign governments after January 1, 1940. The dissenting opinion notes that in extending the coverage of the Longshoremen's and Harbor Workers' Compensation Act⁸¹ to the leased bases, Congress in 1941⁸² and 1942⁸³ amended this Act and in so doing listed Guantanamo in the same category with the Philippine Islands and Alaska, and listed the leased bases acquired after January 1, 1940, separately. This is pointed to as an unfortunate divergence of legislative and judicial opinion, since Congress apparently regarded Guantanamo in a more possessive way than it did the most recently leased bases.

In closing, the dissent argues that it was unnecessary to hold the bases "possessions" in order to apply the Fair Labor Standards Act, and that to do so is to initiate a philosophy of annexation and establish a psychological accretion to our possessions which will have unfortunate repercussions in our foreign relations.

United States v. Spelar

If the rather tenuous majority opinion in *Vermilya-Brown v. Connell* was not sufficiently limited by its own wording or by the dissenting opinion, *United States v. Spelar*,⁸⁴ decided in 1949, effectively accomplished that purpose.

⁷⁸ 335 U.S. 377, at 405.

⁷⁹ United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary General During 1946, 101 (1947).

⁸⁰ 29 C.F.R. §776.1 (Supp. 1947) (Wage and Hour Manual).

⁸¹ 44 Stat. 1424 (1927).

⁸² 55 Stat. 622 (1941).

⁸³ 56 Stat. 1028 (1942).

⁸⁴ 338 U.S. 217 (1949).

The case arose as a wrongful death action under the Federal Tort Claims Act ⁸⁵ as a result of the death of an employee of an airline at Harmon Field, Newfoundland. This field was leased for ninety-nine years under terms similar to those involved in *Vermilya-Brown*, and operated by the federal government.

The question before the court was whether the claim, based on negligent operation of the air field by the government, was one arising in a "foreign country." The Court stated: "By the exclusion of claims 'arising in a foreign country' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States."⁸⁶

Looking to the language of the court in *Vermilya-Brown v. Connell*, that the leasing arrangement did not and was not intended to transfer sovereignty over the areas leased to the United States by Great Britain, the court concluded that the air field was subject to the sovereignty of Great Britain, and lay within a foreign country. The claim was therefore barred.

The court here expressly limits *Vermilya-Brown v. Connell* to mean that the word "possessions" does not necessarily imply sovereignty and that as a matter of interpretation of the Fair Labor Standards Act, the leased bases not in existence at the time of the passage of the act were to be included within the term as used in that statute. In this case, however, a different congressional purpose was involved.

In assessing the overall impact of these two cases on the question of what we have as a matter of international law in the leased bases, it can be concluded that insofar as the British leases are concerned, they are to be definitely regarded as "possessions" only in the sense that the term is used in the Fair Labor Standards Act. The majority holding to this effect in *Vermilya-Brown v. Connell* has not been overruled.

The cases leave two impressions. One is that regardless of what may be said as to the British leases, the case of Guantanamo would be distinguishable to a degree, not only because of the congressional enactment previously noted and the date of its acquisition, but also because our lease there does not provide for automatic termination at the end of ninety-nine years. Also

⁸⁵ 61 Stat. 722 (1947).

⁸⁶ 338 U.S. at 219.

our rights there originally were acquired under circumstances which make our possession of the base much more inherent in the basic relationship between the United States and Cuba. Guantanamo can be said to be a somewhat higher order of possession.

The other impression is that the cases discussed do not answer the question whether as a matter of international law, our base at Guantanamo is such an integral part of the territory of the United States that we would be justified in forcibly defending it in the event of attack by the nation in whom ultimate sovereignty is conceded to reside. They simply clarify to some degree the nature of the legal rights we would be defending if we were to take such a step.

Policy Conflicts

In any event there is an ultimate legal conflict evident here between the claim that Cuba could develop on the basis of its ultimate sovereignty and the United States' rights which are based on territorial sovereignty. This conflict in its essence would turn for its resolution to the same balancing process involved in the clash between *rebus sic stantibus* and *pacta sunt servanda* and would depend in part on how that clash might be resolved.

The question under analysis is to some extent rendered moot because our stated diplomatic policy is that we will take self-defensive steps if the need arises. Our position can be justified to a degree, however, because of the relationship of the base to the total strategic concept of our Caribbean defenses of the Panama Canal, the fact that until adjudicated otherwise, we have a legal right to be there, and its proximity to our own shores renders its possession by a hostile power virtually unthinkable as a matter of national self-defense. The very military nature of the base suggests a certain right of defense, as does the fact that it is conceded to be subject to our territorial sovereignty.⁸⁷ These factors are relevant to a balancing of issues in the legal policy conflict involved as well as for justification of our diplomatic position.

⁸⁷ These factors were brought out in discussion of situations where the right of self-defense has been found applicable. See International Law Ass'n, Report of the Forty-Eighth Conference 566-89 (1958); Schwarzenberger, *The Principle of Self Defense and the Legality of the Use of Force as Recognized in International Judicial Practice*, London Report (1959).

In the *Corfu Channel* case,⁸⁸ the International Court of Justice recognized the right of self-defense by allowing innocent passage through Corfu Channel by British warships in time of peace. Albania's territorial and ultimate sovereignty encompassed the waters of the channel. There would certainly seem to be as valid an argument should the United States be forced to take similar action at Guantanamo Bay. Our rights to Guantanamo Bay are considerably more firmly established and more legally apparent than were those of the British to innocent passage in the *Corfu Channel* case. If the holding of the court in this case can be regarded as precedent, the legal policy supporting the maintenance of our territorial sovereignty would appear to gain weight.

However, when the hypothetical aggressor is the nation in whom ultimate sovereignty resides, the significance of these factors is to some degree reduced. The analogy to the situation which developed between Great Britain and Nasser over the Suez Canal, suggested by Mr. Johnson in "New Statesman" is apparent to a degree.⁸⁹ How can the position we took then be reconciled with the position we take now over Guantanamo? In passing it might be noted that in that instance the Canal was operated by a private corporation and Britain had previously relinquished her rights of occupation for defense. Britain and France invaded for the purpose of keeping the Canal open during the war between Israel and Egypt, not to defend territorial sovereignty.

What can be said in further defense of our present stand is that if Cuba resorts to the use of force, she will, as a matter of international law, have breached not only her international obligation to the United States but also the commitments she undertook when she subscribed to the Charter of the Organization of American States.⁹⁰ Attention is called particularly to the following articles in that Charter.

⁸⁸ *Corfu Channel Case*, [1949] I.C.J. Rep. 4.

⁸⁹ Johnson, *A Caribbean Suez*, 60 *New Statesman* 43-44 (No. 1530, 1960).

⁹⁰ O.A.S. Charter, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3. Parties to the organization are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, *Cuba*, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

Article 5(b)—International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;

Article 6—States are juridicially equal, enjoy rights and equal capacity to exercise these rights, and have equal duties. The rights of each state shall not depend upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.

Article 7—Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law.

Article 8—The fundamental rights of States may not be impaired in any manner whatsoever.

Article 11—The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State.

Article 18—The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self defense in accordance with existing treaties or in fulfillment thereof.

Cuba and the United States are bound indefinitely by these and all the other provisions of this Charter. Its language leaves no doubt that the only legal course for Cuba to pursue is to seek abrogation of our treaty rights by peaceful procedures provided for in the Charter or to withdraw from the Organization of American States before she resorts to the use of force. The withdrawal process requires a two year period of notification before a State may be released from its obligations under the Charter.

The definite existence of American territorial sovereignty over Guantanamo based on our lease and treaty rights with Cuba, when considered in connection with our mutual duties and rights under the Charter of the Organization of American States, leads to the conclusion that the United States as a matter of international law would be justified in defending its base at Guantanamo Bay by the use of force if attacked, and if the applicability of *rebus sic stantibus* had not been established by that time. American territorial sovereignty and supremacy in the base area, though it may be regarded in bare analysis as founded on little more than a contract right, can, it is suggested, reasonably be regarded for judicial purposes as a proper subject

for self-defense under Article 51 of the United Nations as that inherent right has been characterized by scholars down through the ages.⁹¹

IV. CONCLUSION

The events of the next several months may give the factual answers to the questions which have been raised in this discussion without expressly resolving the underlying legal and diplomatic policy conflicts which are involved, some of which have been analyzed herein. Whether this occurs or not, it is important for lawyers to realize that these issues are there and to grasp at the same time the essentially indissoluble bond between law and diplomacy or international politics, if you prefer, recognized in the handling of problems such as those which currently plague Cuban-American relations. Only out of study in a context such as this can truly enduring solutions to problems which carry the law to its frontier, and then ask it to go on beyond, be achieved.

APPENDIX

I.

Agreement Between the United States of America and Cuba signed by the President of Cuba, February 16, 1903. Signed by the President of the United States, February 23, 1903.

Agreement

Between the United States of America and the Republic of Cuba for the lease (subject to terms to be agreed upon by the two Governments) to the United States of lands in Cuba for coaling and naval stations.

The United States of America and the Republic of Cuba, being desirous to execute fully the provisions of the Act of Congress approved March second, 1901, and of Article VII of the Appendix to the Constitution of the Republic of Cuba promulgated on the 20th of May, 1902, which provides:

Article VII. To enable the United States to maintain the independence of Cuba, and to protect the people

⁹¹ Stone, *Legal Controls of International Conflicts* 243-46 (1954). See also *International Law Ass'n, op. cit. supra* note 87, at 550-628; Weightman, *Self Defense in International Law*, 37 *Va. L. Rev.* 1095 (1951).

thereof, as well as for its own defense, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.

have reached agreement to that end, as follows:

ARTICLE I

The Republic of Cuba leases to the United States, for the purpose of coaling and naval stations, the following described areas of land and water situated in the island of Cuba:

1st. In Guantanamo (see Hydrographic Office Chart 1857). From a point on the south coast, 4.37 nautical miles to the eastward of Windward Point Light House, a line running north (true) a distance of 4.25 nautical miles;

From the northern extremity of this line, a line running west (true), a distance of 5.87 nautical miles;

From the western extremity of this last line, a line running southwest (true), 3.31 nautical miles;

From the southwestern extremity of this last line, a line running south (true), to the seacoast.

This lease shall be subject to all the conditions named in Article II of this agreement.

* * *

ARTICLE II

The grant of the foregoing Article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrance thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

ARTICLE III

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of

the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

* * *

T. Estrada Palma

* * *

Theodore Roosevelt

II.

Lease of Coaling or Naval Stations

Signed at Havana, July 2, 1903.

Approved by the President of the United States, October 2, 1903.

Ratified by the President of Cuba, August 17, 1903.

Ratifications exchanged at Washington, October 6, 1903.

The United States of America and the Republic of Cuba, being desirous to conclude the conditions of the lease of areas of land and water for the establishment of naval or coaling stations in Gantanamo . . . the Republic of Cuba made to the United States by the agreement of February 16/23, 1903, in fulfillment of the provisions of Article Seven of the Constitutional Appendix of the Republic of Cuba, have appointed their plenipotentiaries to that end.

* * *

ARTICLE I

The United States of America agrees and covenants to pay to the Republic of Cuba the annual sum of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use said areas by virtue of said agreement.

All private lands and other real property within said areas shall be acquired forthwith by the Republic of Cuba.

The United States of America agrees to furnish to the Republic of Cuba the sums necessary for the purchase of said private lands and properties and such sums shall be accepted by the

Republic of Cuba as advance payment on account of rental due by virtue of said agreement.

ARTICLE II

The said areas shall be surveyed and their boundaries distinctly marked by permanent fences or inclosures.

The expense of construction and maintenance of such fences or enclosures shall be borne by the United States.

ARTICLE III

The United States of America agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said areas.

ARTICLE IV

Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.

On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.

ARTICLE V

Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive consumption therein, shall not be subject to payment of customs duties nor any other fees or charges and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged other than through a regular port of entry of the Republic of Cuba when both cargo and vessel shall be subject to all Cuban Customs laws and regulations and payment of corresponding duties and fees.

It is further agreed that such materials, merchandise, stores and munitions of war shall not be transported from said areas into Cuban territory.

ARTICLE VII

* * *

H. G. Squiers

Jose M. Garcia Montes

* * *

Theodore Roosevelt

III.

Treaty Between the United States of America and Cuba
Signed at Washington, May 29, 1934.

Ratification advised by the Senate of the United States, May 31,
1934 (legislative day of May 28, 1934).

Ratified by the President of the United States, June 5, 1934.

Ratified by Cuba, June 4, 1934.

Ratifications exchanged at Washington, June 9, 1934.

Proclaimed by the President of the United States, June 9, 1934.

* * *

ARTICLE I

The treaty of Relations which was concluded between the
two contracting parties on May 22, 1903, shall cease to be in
force, and is abrogated, from the date on which the present
Treaty goes into effect.

ARTICLE II

All the acts effected in Cuba by the United States of America
during its military occupation of the island, up to May 20, 1902,
the date on which the Republic of Cuba was established, have
been ratified and held as valid; and all the rights legally acquired
by virtue of those acts shall be maintained and protected.

ARTICLE III

Until the two contracting parties agree to the modification or
abrogation of the stipulations of the agreement in regard to
the lease to the United States of America of lands in Cuba for
coaling and naval stations signed by the President of the Re-
public of Cuba on February 16, 1903, and by the President
of the United States of America on the 23d day of the same
month and year, the stipulations of that agreement with regard
to the naval station of Guantanamo shall continue in effect. The

supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.

ARTICLE IV

If at any time in the future a situation should arise that appears to point to an outbreak of contagious disease in the territory of either of the contracting parties, either of the two Governments shall, for its own protection, and without its act being considered unfriendly, exercise freely and at its discretion the right to suspend communications between those of its ports that it may designate and all or part of the territory of the other party, and for the period that it may consider to be advisable.

* * *

Cordell Hull
Sumner Welles
M. Marquez Sterling

* * *

Franklin D. Roosevelt

IV.

Pertinent excerpts from the Charter of the Organization of American States, April 30, 1948.

Part One

Chapter I

Nature and Purposes

ARTICLE I

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to

strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence. Within the United Nations, the Organization of American States is a regional agency.

ARTICLE 2

All American States that ratify the present Charter are members of the Organization.

* * *

ARTICLE 4

The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United States, proclaims the following essential purposes:

- (a) To strengthen the peace and security of the continent;
- (b) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among Member States;
- (c) To provide for common action on the part of those States in the event of aggression;
- (d) To seek the solution of political, juridical, and economic problems that may arise among them; and
- (e) To promote, by cooperative action, their economic, social and cultural development.

Chapter II

Principles

ARTICLE 5

The American States reaffirm the following principles:

- (a) International law is the standard of conduct of States in their reciprocal relations;
- (b) International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;
- (c) Good faith shall govern the relations between States;
- (d) The solidarity of the American States and the high aims which are sought through it require the political organization of

those states on the basis of the effective exercise of representative democracy;

(e) The American States condemn war of aggression: victory does not give rights;

(f) An act of aggression against one American State is an act of aggression against all American States;

(g) Controversies of an international character arising between two or more American States shall be settled by peaceful procedures;

(h) Social justice and social security are bases of lasting peace;

(i) Economic cooperation is essential to the common welfare and prosperity of the peoples of the continent;

(j) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex;

(k) The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purpose of civilization;

(l) The education of peoples would be directed toward justice, freedom and peace.

Chapter III

Fundamental Rights and Duties of States

ARTICLE 6

States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.

ARTICLE 7

Every American State has the duty to respect the rights enjoyed by every other state in accordance with international law.

ARTICLE 8

The fundamental rights of States may not be impaired in any manner whatsoever.

ARTICLE 9

The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.

ARTICLE 10

Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

ARTICLE 11

The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State.

ARTICLE 12

The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.

ARTICLE 13

Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

ARTICLE 14

Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States. International treaties and agreements should be public.

ARTICLE 15

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other state. The foregoing principle prohibits not

only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

ARTICLE 16

No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

ARTICLE 17

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

ARTICLE 18

The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self defense in accordance with existing treaties or in fulfillment thereof.

ARTICLE 19

Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17.

Chapter IV

Pacific Settlement of Disputes

ARTICLE 20

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Chapter, before being referred to the Security Council of the United Nations.

ARTICLE 21

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial

settlement, arbitration, and those which parties to the dispute may especially agree upon at any time.

ARTICLE 22

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the Parties shall agree on some other peaceful procedure that will enable them to reach a solution.

ARTICLE 23

A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period.

* * *

Part Three

Chapter XVI

The United Nations

ARTICLE 102

None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.

* * *

Chapter XVIII

Ratification and Entry Into Force

ARTICLE 112

The present Charter shall remain in force indefinitely, but may be denounced by any Member State upon written notification to the Pan American Union, which shall communicate to all others each notice of denunciation received. After two years from the date on which the Pan American Union receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising under the present Charter.

V.

Pertinent Excerpts from the United Nations Charter

Chapter VI

Pacific Settlement of Disputes

Art. 33. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Art. 34. The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Art. 35. 1. Any member of the United States may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or General Assembly.

* * *

Art. 36. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Art. 37. 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take ac-

tion under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Art. 38. Without prejudice to the provisions of Article 33 to 37, the Security Council may, if all parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

Chapter VII

Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

Art. 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Art. 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Art. 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

Art. 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations.

* * *

Art. 51. Nothing in the present Charter shall impair the inherent

right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Chapter VIII

Regional Arrangements

Art. 52. 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.

2. Member of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the obligations of Articles 34 and 35.

VI.

The Law of Treaties

UN Document A/CN.4/107

Second Report by G. Fitzmaurice, Special Rapporteur
Vol. II—Yearbook of the International Law Commission 1957,
pp. 32-33, Comment pp. 55-56, United Nations, New York (1958).
Article 18. Termination or suspension by operation of law.
Case of fundamental breach of the treaty (general legal character and effects)

1. A fundamental breach of a treaty (as defined hereafter), or of an essential obligation under it, committed by one party, may, in the case of a bilateral treaty, justify the other party in regarding and declaring the treaty as being at an end; and, in the case of a multilateral treaty, may justify the other parties (a) in refusing performance, in their relations with the defaulting party, of any obligations of the treaty which consist of a mutual and reciprocal interchange of benefits or concessions as between the parties; or (b) in refraining from the performance of obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance.

2. The case of fundamental breach is to be distinguished from those cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty. In such cases there is no question of the treaty, or of its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself.

3. The principle of termination by fundamental breach is limited in three respects as described in article 19 below: (a) as to the types of treaties in respect of which it can be invoked; (b) as to the character of the breach which will justify it; and (c) as to certain particular circumstances the existence of which will preclude a party from invoking it. In addition, the party invoking the right can only do so in the manner and with the consequences indicated in article 20 below.

Article 19. Termination or suspension by operation of law.

Case of fundamental breach of the treaty (conditions and limitations of application)

1. Limitations in respect of the type of treaty.

(i) Fundamental breach as a ground, giving a right to the other party to declare the termination of the treaty, applies in principle only in the case of bilateral, not multilateral, treaties.

(ii) Subject to the special case mentioned in sub-paragraph (iii) below, a breach, however serious, of a multilateral treaty by one party does not give the other parties a right to terminate the treaty. However, in the case of obligations of the reciprocal, or interdependent, type, a fundamental breach will justify the other parties:

(a) In their relations with the defaulting party, in refusing performance for the benefit of that party of any obligations of the treaty which consist in a reciprocal grant or interchange between the parties of rights, benefits, concessions or advantages, or of a right to particular treatment in some field with respect to a particular matter:

(b) In ceasing to perform any obligations of the treaty which have been the subject of the breach, and which are of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties.

(iii) In the case of law-making treaties (*traites-lois*), or of system or regime creating treaties (e.g., for some area, region or locality), or of treaties involving undertaking to conform to certain standards and conditions, or of any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty as in the cases contemplated in heads (a) and (b) of sub-paragraph (ii) above, so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions—a breach (however serious) by one party:

(a) Can never constitute a ground of termination or withdrawal by the other parties;

(b) Cannot even (to the extent to which that might otherwise be relevant or practicable) justify non-performance of the obligation of the treaty in respect of the defaulting party or its nationals, vessels, etc.

2. Limitations implied by the character of the breach justifying the plea of termination.

(i) The breach must be a fundamental breach of the treaty in an essential respect, going to the foot or foundation of the treaty relationship between the parties, and calling in question

the continued value or possibility of that relationship in the particular field covered by the treaty.

(ii) It must therefore be tantamount to a denial or repudiation of the treaty obligation, and such as to either (a) destroy the value of the treaty for the other party; (b) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (c) render abortive the purposes of the treaty.

(iii) If the breach is one that the parties foresaw as being possible, and for which they provided in the treaty or in any other relevant agreement, either it must be regarded as not having the character of a fundamental breach in the circumstances, or its consequences will be governed by the treaty itself, or other agreement, according to its correct interpretation, and not by any general rule of law as to termination by fundamental breach.

3. Limitations imposed by particular circumstances operating to preclude the pleas of fundamental breach being invoked.

Even where the breach is fundamental according to the foregoing principles it may not be invoked as a ground for terminating the treaty:

(i) If the treaty, according to its own terms, is due to expire in any event within a reasonable period, or can be denounced by the other party within such a period, or upon giving a reasonable period, or can be denounced by the other party within such a period, or upon giving a reasonable period of notice. What period is to be deemed reasonable for these purposes will depend on the character and purposes of the treaty, the nature of the breach, and the surrounding circumstances.

(ii) If the claim that the treaty is terminated by fundamental breach is not made by the other party within a reasonable time after the occurrence of the breach. Failing this, the other party must be deemed tacitly to have accepted the breach, not as justified, but as not constituting a ground for termination, or else to have waived its right to claim termination. What will constitute a reasonable time will depend on the same considerations as set out in sub-paragraph (i) above. Complaint about the breach itself, even if made within a reasonable time, does not per se amount to a claim of termination of the treaty, which, if intended, must be made separately and specifically.

(iii) If the other party has in some manner condoned the breach, or otherwise given clear evidence of an intention to regard the treaty as being still in force, despite the breach.

(iv) If the other party itself bears a direct or proximate responsibility for the breach, by having instigated or connived at it, or by having directly caused or contributed to it.

Article 20. Termination or suspension by operation of law. Case of fundamental breach of the treaty (modalities of the claim to terminate)

1. The question whether there has been a fundamental breach, being as a rule controversial and itself in issue between the parties, the party claiming to make it a basis for termination must set out the grounds for such a claim in a reasoned statement to be communicated to the other party as soon as possible, and must, pending consideration by that party, take no further action.

2. If the party receiving the statement does not reply within a reasonable time, either accepting or contesting the claim of termination, or replies contesting it, the complaining party may then offer to refer the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, to the International Court of Justice); and only if such offer is made, but declined, or not accepted within a reasonable time, can the complaining party declare the treaty definitely at an end. If the offer is accepted, it will be a matter for the tribunal to decide what temporary measures of suspension or otherwise may be taken by the parties, pending its final decision.

3. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and in the case of any conflict with the preceding paragraphs of the present article, will prevail.

4. Except by the decision of a competent tribunal, neither party will lose any right it might otherwise have to claim damages or other reparation, or to take counter action, whether in

respect of breach or non-observance of the treaty, or of its purported termination if the latter is invalid.

Article 21. Termination or suspension by operation of law. Case of essential change of circumstances or principle of *rebus sic stantibus* (general legal character)

1. In the case of treaties not subject to any provision, express or implied, as to duration, a fundamental and unforeseen change in essential circumstances which existed when the treaty was entered into, and with reference to which both parties can be shown to have contracted, may entitle a party to proceed to a suspension of any further performance of the obligations of the treaty pending its revision by agreement between the parties, mutual agreement to terminate it, or an arbitral or judicial decision pronouncing its termination in view of the change of circumstances.

2. Such right of suspension can, however, only be exercised subject to the conditions and limitations specified in article 22 below regarding (a) the type of treaty involved; (b) the character of the change of circumstances; (c) the circumstances in which a party will be precluded from invoking the change. In addition, the party invoking the change can do so only in the manner and with the consequences indicated in article 23.

3. A fundamental and unforeseen change of circumstances, or the principle of *rebus sic stantibus*, which is in essence a residual ground of termination or suspension, cannot *as such* be invoked in any case where termination or suspension results from, or can be effected under, the terms of the treaty itself or other special agreement between the parties, or on any of the other grounds of termination or suspension by operation of law specified in article 17 above, even where these also involve certain changed circumstances.

4. The principle of *rebus sic stantibus*, which is an objective principle of law, does not involve any "clausula" *rebus sic stantibus* deemed to be implied in all treaties of unlimited duration, and determining them on the occurrence of an essential change of circumstances. If the particular treaty itself, as a matter of its normal and correct legal interpretation, does actually require

to be read as containing such an implied revision, the case is not one of termination by operation of law, but of termination provided for by the treaty itself, through an implied resolutive condition.

Article 22. Termination or suspension by operation of law. Case of essential change of circumstances or principle of *rebus sic stantibus*

(conditions and limitations of application)

The application of the principle of *rebus sic stantibus* is subject to conditions and limitations broadly analogous, *mutatis mutandis*, to those set out in article 19 above regarding the case of termination resulting from a fundamental breach of the treaty:

1. Limitations arising out of the type of treaty involved.

(i) The principle *rebus* finds its sphere of application mainly in the field of bilateral treaties. As regards multilateral treaties, its application is governed by paragraphs (ii) to (iv) below.

(ii) The principle of *rebus* cannot, as such be invoked in the case of treaties of the kind described in article 19, paragraph 1 (iv) above. (Law making treaties or system or regime creating treaties, or treaties involving undertakings to conform to certain standards and conditions, or treaties where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty, so that the obligation is of a self-existent character.)

(iii) As regards treaties of the type described in article 19, paragraph 1, subparagraph (ii) (a) above (treaties whose obligations consist in a reciprocal grant or interchange between the parties of rights, benefits, concessions or advantages, or of a right to a particular treatment in some field with respect to a particular matter) the principle of "*rebus*" cannot, in the case of an essential change of circumstances affecting one or more parties only, be invoked as a ground for the termination of the treaty itself, but only as a ground for the withdrawal, or for the suspension of the obligations of such particular party or parties.

(iv) In the case of treaties of the type described in subparagraph (ii) (b) of paragraph 1 of article 19 above (treaty the performance of whose obligations by one party is necessarily dependent on a corresponding performance by the other party) the withdrawal, or the suspension of the obligations of one party,

on grounds of *rebus sic stantibus* may justify the withdrawal of the other parties or a suspension of their obligations.

2. Limitations as to the character of the change necessary before the principle of *rebus* can be invoked.

A change can only be regarded as being an essential one for the purpose of invoking the principle *rebus* if it has the following character:

(i) The change must be an objective change in the factual circumstances relating to the treaty and its operations, and not merely a subjective change in the attitude towards the treaty of the party invoking the principle.

(ii) The change must relate to a situation of fact, or state of affairs, existing at the time of the conclusion of the treaty, with reference to which *both* the parties contracted, and the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the particular obligation to which the changed circumstances are said to relate.

(iii) The change must have the effect (a) of rendering impossible the realization, or further realization, of the objects and purposes of the treaty itself, or of those to which the particular obligation concerned relates; or (b) of destroying or completely altering the foundation of the obligation based on the situation of fact or state of affairs referred to in sub-paragraph (ii) above.

(iv) A change in the motives that led a party to enter into the treaty, or in the inducement to that party to continue the performance of it, or of any particular obligation under it, is not in itself either an essential change of circumstances, or a change having one of the effects specified in sub-paragraph (iii) above.

(v) The change must not be one that was foreseen by the parties, or be such as they might, by the exercise of reasonable foresight, have anticipated. It must not, therefore, either expressly or by necessary implication, be a change which is provided for in the treaty, or in any other relevant agreement between the parties, for in that case the treaty or agreement would prevail, and the principle *rebus* would, as such, be inapplicable.

3. Limitations arising from particular circumstances oper-

ating to preclude a party from invoking the principle *rebus*.

Even where the character of the change of circumstances is such as to conform to the foregoing conditions, it may not be invoked:

(i) Unless the treaty is of indefinite duration, and contains no provision, express or implied, for its expiry or termination on giving notice;

(ii) Unless the change is invoked within a reasonable time after the date of its occurrence or completion—failing which it must be presumed not to be fundamental;

(iii) If the change of circumstances has been caused, brought about, or directly or proximately contributed to by the act or omission of the party invoking it.

Article 23. Termination or suspension by operation of law.

Case of essential change of circumstances or principle of *rebus sic stantibus* (modalities of the claim)

1. In the absence of agreement between the parties, or of an appropriate pronouncement by an international arbitral or judicial tribunal, an allegation of fundamental change of circumstances on the basis of the principle *rebus sic stantibus* cannot, of itself cause the termination of the treaty but only the suspension of further performance, and then only in accordance with the following procedure.

2. . . . the party invoking the principle of *rebus* must set out the grounds of the claim in a reasoned statement to be furnished to the other party or parties, and must request the concurrence of such party or parties in a revision of the treaty, or in its termination, or in the withdrawal of the party concerned.

3. If the request is not acceded to, the party invoking the change may offer to refer the matter to an appropriate tribunal to be agreed between the parties (or failing such agreement, the International Court of Justice). If such offer is made, and the other party or parties do not, within a reasonable time accept it, the party invoking the change may then suspend performance of the obligation or obligations concerned. If the other party or parties accept reference to a tribunal, it will be for the tribunal to decide what temporary measures in regard to suspension or otherwise may be taken by the parties, pending

its final decision. If the party invoking the change does not elect to offer reference to a tribunal, the treaty, and the obligations of the parties under, will continue in full force and effect.

4. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and, in case of any conflict with the preceding paragraphs of the present article, will prevail.

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